
**REPRESENTATIONS OF JERSEY TELECOM IN RESPONSE TO
AN INITIAL NOTICE DATED 17 MAY 2010**

Factual Background

1. In January 2010 Jersey Telecom ("JT") notified the Jersey Competition Regulatory Authority ("JCRA") of its intention to introduce a product consisting of a combination of three services: fixed-line, broadband, and mobile telephone, at a single price of £39.99. This product is hereafter referred to as "Triple Play" and it included amongst other things:
 - (1) a discount in relation to the mobile telephone service (which discount was only available as part of Triple Play); and
 - (2) a discount of £4.00 per month from the usual cost of the fixed-line service (the usual price of the service offered for customers was £16.40 but it was charged at £12.40 if taken as part of Triple Play).
2. The JCRA objected to this proposed bundle saying that it was not replicable by other licensed operators. JT voluntarily withdrew Triple Play.
3. On 26th March 2010, and having complied with the relevant licence conditions, JT introduced a product consisting of a combination of two services: broadband access and a mobile telephone service, at a single price of £25.55. This product is called JT Complete. The JCRA has no objections to this product.
4. On 20th March 2010, and having complied with the relevant licence conditions, JT introduced a product consisting of a fixed-line telephone service with, amongst other things, 100 minutes of free local calls at a price of £14.40. This product is called CoreLine 100. The JCRA has no objections to this product.
5. On 26th March 2010, JT produced an advertisement ("the Advertisement") for JT Complete and Coreline 100 identifying a combined price of £39.95. This is in fact the sum of the prices for JT Complete (£25.55) and Coreline 100 (£14.40).

The Initial Notice

6. On 17 May 2010 before issuing and/or serving any Initial Notice under the Telecommunications (Jersey) Law 2002 on JT:
 - (1) The JCRA issued a Press Release (embargoed until 0:01 am on Wednesday 19 May 2010) stating that *"JT refused to withdraw the triple-play advertisement voluntarily. Thus, under the circumstances, the JCRA has no choice but to resort to formal enforcement action against JT under the Law."*
 - (2) The Executive Director of the JCRA, Chuck Webb, was interviewed on BBC Radio Jersey and said amongst other things that:
 - (a) *"basically JT can offer a two part bundle but not advertise a three part bundle";*
 - (b) *"all we are seeking from JT at this point is to remove the advertisement advertising a triple play bundle...we are not seeking to unwind contracts";*
 - (c) *"We are requiring them to stop advertising a triple play bundle, a complete bundle, now look we've said they can advertise a double play bundle and if someone comes into the JT shop and says I want my double play bundle, oh and by the way I want my fixed line from you too if it's the customer's choice then fine...";*
 - (d) *"If a consumer wants it they can sell it but they cannot affirmatively advertise it...";*
 - (e) *"JT will give their view and JCRA will stick to our view and this is how the legal process works under the law".*
7. Later on 17 May 2010 the JCRA issued and sent to JT an Initial Notice in respect of the Advertisement and annexed a copy of the same to the Initial Notice.
8. The JCRA seemingly asserts that:
 - (1) Triple Play was a breach of Licence Condition ("LC") 31;
 - (2) the Advertisement includes *"the non-replicable fixed line element"* of Triple Play (paragraph 7 of the Initial Notice);
 - (3) JT is advertising a promotion without having filed a LC 33 Notice (paragraph 9 of the Initial Notice);
 - (4) JT has failed to comply with LC 31 (paragraph 1 of the draft Direction).

9. Under the terms of the draft Direction, the JCRA proposes to direct JT to cease *"to advertise the offer or promotion currently referred to as the JT Complete Bundle as such, or similar wording which makes reference to "then add fixed line.""*
10. In essence the JCRA want to direct JT under article 19 of the Telecommunications (Jersey) Law 2002 to cease advertising together 2 separate products.

Response

11. JT's Representations in response to the Initial Notice are in summary, as follows:
 - (1) JT Complete and Coreline 100 are not the same as Triple Play;
 - (2) The advertising together of 2 separate products cannot and does not breach LC 31 or LC 33;
 - (3) The JCRA is purporting to act outwith its powers.

The Nature of JT Complete and Coreline 100 and Triple Play

12. The name "JT Complete" refers to the two-part bundle of mobile and broadband services. It is uncontentious and the JCRA does not object to JT bundling mobile and broadband products together, with a discount, and offering the same in the market at a price of £25.55.
13. Coreline 100 is a standard JT product. It too is uncontentious and the JCRA does not object to JT offering the product same in the market at a price of £14.40. Importantly:
 - (1) Coreline 100 at a price of £14.40 per month is available to customers and non-customers of JT alike, including customers of other licensed operators ("OLOs").
 - (2) It is available at that price as a free-standing product.
 - (3) There is no requirement for a customer to purchase JT Complete to obtain Coreline 100 whether at all or at a price of £14.40.
 - (4) There is no requirement for a customer to purchase Coreline 100 to obtain JT Complete whether at all or at a price of £25.55.
 - (5) There is no link or bundling between JT Complete and/or Coreline 100.

14. In terms, any OLO could include reference to Coreline 100 at a price of £14.40 in any advertisement.
15. Triple Play was different. The fixed line service included within Triple Play:
 - (1) was only available at the specified price to customers who purchased Triple Play; it was not available at the specified price to anyone else (be they customers or non-customers of JT).
 - (2) was not available at that price as a free-standing product.
 - (3) could only be obtained by a customer who purchased Triple Play.
 - (4) was linked and/or bundled with the mobile and broadband elements of the package.
16. In terms, no customer of any OLO could obtain the fixed line product at the same price as a customer purchasing Triple Play. JT conceded that in the circumstances bundling these three products together could not be replicated by any OLO.
17. This is not the case with the Advertisement. There is nothing preventing an OLO competing against JT in mobile and broadband from informing their customer that even were they to get Coreline 100 from JT, they could offer a better, more efficient and/or cheaper package.
18. The fundamental misconception on the part of the JCRA is that the advertisement refers to Triple Play by another name. It does not. The advertisement is merely marketing separate and distinct products: the discounted two-part bundle called JT Complete, and the non-discounted ordinary land-line service called Coreline 100. There is no three-part product or bundle. Advertising or giving details of various products in a single message does not make them a single product.
19. Discounting is the essence of bundling (i.e. $\text{Price} < \text{price 1} + \text{price 2} + \text{price 3}$). It is axiomatic that the sole purpose of offering a bundled product is to offer it at a lower price than its constituent parts. A bundled product without any discount is not a new product at all, merely a collection of existing products (and does not fall within the parameters of LC 33.1). Moreover, any such purported "product" is a logical nonsense as well as a commercial non-starter; in adding nothing to the existing products, the new "product" has no separate identity. Yet this is exactly the position with the Advertisement; there is no new product merely a collection of existing ones without any further discount.

LC 31 and/or LC 33.

20. LC 31 provides that:

"The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any Telecommunications Services or Access. The Licensee will be deemed to be in breach of this Condition if it favours any business carried on by the Licensee or a Subsidiary or Joint Venture or Other Licensed Operator so as to place Other Licensed Operators competing with that business at an unfair disadvantage in relation to any licensed activity."

21. Coreline 100 is available to all and there is no complaint about the product itself. Similarly in relation to JT Complete. Accordingly, in providing Coreline 100 and/or JT Complete, the JCRA cannot but accept that JT is not showing any *"undue preference to or exercise unfair discrimination against, any User or Other Licensed Operator"*. This much would appear to be agreed by the JCRA given the comments of Mr Webb in his interview with Radio Jersey.

22. It is the advertising of Coreline and JT Complete together which has exercised the JCRA and it is the advertising which the JCRA wishes to stop. The draft Direction (and indeed the comments of Mr Webb in the radio interview) require JT to cease advertising not selling. If the products really had been offered in breach of LC 31 and/or LC 33, the JCRA would have directed JT to unwind the contracts (as it would of necessity have breached its licence and/or profited from its undue preference and unfair discrimination. The fact the JCRA does not seek to unwind the contracts is telling. If there were a substantive breach of the licence, there would be a single identifiable product and price, to which JCRA would point and require to be withdrawn. The fact that the JCRA cannot point to a product, or to a price, demonstrates clearly that there is not.

23. Advertising products which are uncontentious in themselves does not fall within the ambit of LC 31 which is limited to the *"provision of any Telecommunications Services or Access"*. Whilst the products clearly do relate to the *"provision of any Telecommunications Services"*, the advertising of products does not.

24. Further and/or alternatively, in advertising products that are freely available to all, it cannot be said that JT is showing any undue preference to its own customers as customers of OLOs can obtain the same product at the same price. Nor can it be said that JT is discriminating either unfairly or indeed, at all.

25. Moreover, beyond a general assertion in the draft Direction that JT is in breach of LC 31, the JCRA has failed to provide any particulars as to how the Advertisement breaches LC 31. Unless

and until the JCRA does so, JT reserves the the right to make such further or supplemental representations as it thinks fit in respect thereof.

26. LC 33.1 requires JT to give notice of:

- (1) *"new prices for any Telecommunication Services, or prices for new Telecommunication Services to be introduced by the Licensee";*
- (2) *"any discounts to published prices for Telecommunication Services";* or
- (3) *"special offers to all or any of its customers for particular categories of Telecommunication Services."*

27. The Advertisement does not contain any:

- (1) new prices for any Telecommunication Services, or prices for new Telecommunication Services;
- (2) any discounts to published prices for Telecommunication Services; or
- (3) any special offer.

28. Accordingly, LC33.1 does not apply.

29. All that the Advertisement does is to highlight an overall monthly price for a mobile and broadband service (to which the JCRA does not object) and a fixed line service (to which the JCRA also does not object). LC33.1 does not and cannot apply to the Advertisement.

30. Moreover, given the explicit terms of article 7 of the Law which relate to *"telecommunication services"*, it is not accepted that the JCRA even has the power under the Law to regulate advertising of products and/or to impose licence conditions relating to advertising.

The JCRA's Powers

31. The JCRA is required to act within the scope of the authority conferred by the Law.

32. For the reasons set out above, the Law does not permit the JCRA to regulate advertising.

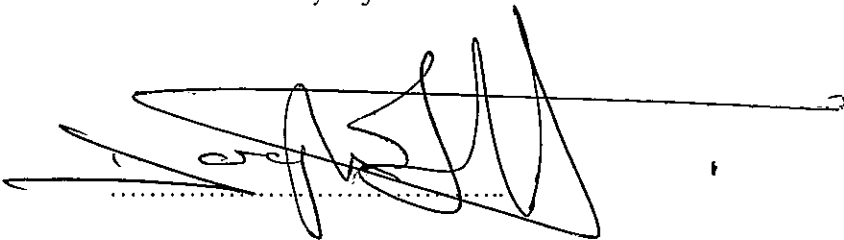
33. Further, there are no licence conditions applicable to JT which permit the JCRA to control advertising.

34. By Article 7(3) of the Telecommunications (Jersey) Law 2002, the JCRA is required to ensure that telecommunications services are "accessible to and affordable by the maximum numbers of business and domestic users". The effect of the Advertisement is to demonstrate that broadband and mobile services are available for only £25.55 more than a traditional land-line only service. The advertisement can only have the effect of promoting modern telephone services to consumers who previously considered such services inaccessible or unaffordable. By attempting to suppress the advertisement, the JCRA is in breach of its duty under Article 7 to foster growth of the market for such services.

35. Under the terms of the Law, the JCRA is required to consider response to the Initial Notice and then following those considerations, the JCRA should determine how it wishes to proceed further. Contrary to the express requirements of the Law the JCRA, through the Radio Jersey interview with Mr Webb, has improperly indicated that whatever representations JT might make, the JCRA "*will stick to our view.*" It is wholly improper for the JCRA to predetermine any issue or to give the appearance of pre-determining any issue. It represents an unreasonable and unsustainable failure or refusal by a public regulator to give due consideration to the nature of the issues in dispute and in particular the substance of the offending advertisement and is outwith the powers and authority of the JCRA.

36. The JCRA is respectfully urged to reconsider the Initial Notice.

Dated this 17th day of June 2010

A handwritten signature in black ink, appearing to read 'Daragh McDermott', is written over a horizontal dotted line. The signature is stylized and extends to the right of the line.

DARAGH MCDERMOTT

FOR AND ON BEHALF OF JERSEY TELECOM LIMITED